Filed 12/6/04 Lennett v. World Savings Bank CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BARRY ELLIOT LENETT, Plaintiff and Appellant, v. WORLD SAVINGS BANK, FSB et al., Defendants and Respondents.	B174396 (Los Angeles County Super. Ct. No. PC030097)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed in part, reversed in part.

Everett L. Skillman for Plaintiff and Appellant.

Moss Pite & Duncan and Michelle A. Mierzwa for Defendants and Respondents.

Barry Lenett appeals from a judgment against him in his action arising from the foreclosure sale of his property. He argues that the trial court erred in sustaining a demurrer as to two of his causes of action for damages, in granting summary judgment on the remaining causes of action, and in denying his motions to vacate the judgment and to file a third amended complaint. He also argues we must reverse the award of contractual attorney's fees in favor of the defendants and award him fees on appeal.

We conclude that summary judgment was properly granted because plaintiff cannot attack the foreclosure sale after the trustee delivered a trustee's deed to a bona fide purchaser for value. The trial court erred in sustaining the demurrer to the damages causes of action as to the lender, but properly sustained it without leave to amend as to the trustee. In light of these conclusions, we do not reach the issues regarding plaintiff's motion to vacate the judgment, and we reverse the order of attorney fees for recalculation in light of the views we express.

FACTUAL AND PROCEDURAL SUMMARY

Plaintiff obtained an adjustable rate mortgage from World Savings Bank, FSB (World) to finance the purchase of a home on Mojave Trail in Chatsworth. He executed a promissory note for $176,000 which obligated him to make monthly payments of principal and interest. He also executed a deed of trust granting World a security interest in the property. Each instrument contained a similar provision governing notice, stating that plaintiff was to receive notice at the Mojave Trail address, and that he was allowed to give World notice of an alternative address. Only one mailing address could be designated at any time. While the note specified that plaintiff must give written notice of an alternative address, the Deed of Trust provided only that plaintiff give "a notice of my alternative address."

The procedure for plaintiff to give notice to World also was specified in the instruments. The note and the deed of trust each stated that notice was to be given to World by mail to an address in Oakland, California. World reserved the right to give plaintiff notice of a different address.

World asserts that plaintiff repeatedly made late payments and missed payments beginning in February 1997. In January 2001, World received notice from the Los Angeles County Tax Assessor that plaintiff was delinquent on his property taxes. World paid delinquent property taxes and penalties for 1998, 1999, and 2000-2001. In August 2001, plaintiff's hazard insurance carrier, Farmers Insurance, sent World a copy of a notice of cancellation of the policy. When plaintiff did not respond to a notice from World to pay the premium, World purchased a lender-placed insurance policy to protect the property. In November 2001, World received another notice of delinquent taxes from the Los Angeles County Tax Collector and paid the 2001 tax installment.

In July 2001, World referred the loan to trustee Golden West Savings Association Services, Co. (Golden West) for commencement of nonjudicial foreclosure proceedings. Golden West recorded a substitution of trustee[1] and a notice of default on July 31, 2001. On August 2, 2001, Golden West mailed a copy of the notice of default to plaintiff at the Mojave Trail address.

In November 2001, Golden West recorded a notice of sale, scheduling the foreclosure sale for December 11, 2001. A copy was mailed to plaintiff at the Mojave Trail address. When plaintiff did not respond by requesting reinstatement or payoff, the foreclosure sale was conducted as scheduled. The purchaser was Westhaven, LLC, which paid $201,600 for the property. The trustee issued a deed upon sale to Westhaven, which was duly recorded in the Los Angeles County Recorder's Office.

In April 2002, plaintiff filed his original complaint against World, Westhaven, and Golden West. (Westhaven is not a party to this appeal and we do not adjudicate rights between it and plaintiff. We refer to World and Golden West collectively as "defendants.") Plaintiff sought to quiet title as to Westhaven's claim, cancel the trustee's deed upon sale, obtain a judicial declaration as to his right to the property, enjoin Westhaven's efforts to evict him from the property, and obtain damages from World and

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[1] Replacing the original trustee, Golden West Financial Corporation.

Golden West for the foreclosure sale, for slander of title, and for negligent infliction of emotional distress. The trial court sustained defendants' demurrer, allowing leave to amend all but the cause of action for slander of title.

Plaintiff's first amended complaint realleged the same causes of action of the original complaint except that he omitted the slander of title cause of action. World filed an answer to the first amended complaint. Golden West filed a declaration of non-monetary status pursuant to Civil Code section 2924,[2] stating that it had been named as a defendant solely because of its capacity as trustee under the deed of trust, and agreeing to be bound by whatever order or judgment was issued by the trial court regarding the deed of trust.

Plaintiff filed a verified second amended complaint, alleging causes of action for declaratory relief to resolve the rights of the parties to the property (1st cause of action), negligence for failure to give proper notice of default and of the trustee's sale and in pursuing the foreclosure even though plaintiff was not in default (2d cause of action), negligent infliction of emotional distress (3d cause of action), quiet title against Westhaven (4th cause of action), and cancellation of the deed (5th cause of action).

Defendants demurred to the cause of action for negligence on both procedural and substantive grounds. They argued that plaintiff was not permitted to add this cause of action because California law limits the scope of permissible amendment to the causes of action as to which a prior demurrer had been sustained. They also contended that plaintiff was limited to contract, rather than tort remedies, and that he failed to plead the elements of duty and breach. World demurred to the third cause of action for negligent infliction of emotional distress on the grounds that plaintiff had failed to allege the elements of a negligence claim or to allege physical injury as a result of the alleged harm, and that he improperly sought punitive damages on this cause of action. Defendants also moved to strike the request for punitive damages.

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[2] All statutory references are to the Civil Code unless otherwise indicated.

The trial court sustained the demurrer to the second cause of action for negligence on the ground that plaintiff was not entitled to assert it. The minute order also stated: "In the alternative, the Court sustains the demurrer to the second cause of action for negligence. Without a properly pled negligence cause of action, the third cause of action for negligent infliction of emotional distress must fail as well."

This ruling left plaintiff with his first cause of action for declaratory relief against both defendants and the fifth cause of action for cancellation of the deed against Golden West and Westhaven. Plaintiff, in propria persona, filed a motion for summary adjudication of issues, and defendants moved for summary judgment, or in the alternative, summary adjudication.

Plaintiff filed a separate statement of disputed issues and his own declaration (with exhibits) in opposition to the motion for summary judgment, but he did not file points and authorities. He also filed evidentiary objections to the declarations submitted in support of defendants' motion for summary judgment. Defendants filed a reply and their own evidentiary objections.

The trial court overruled defendants' evidentiary objections to plaintiff's declaration that he mailed a change of address to World on March 22, 2001, providing a new address on Devonshire, and to the copy of that letter. It sustained objections to portions of plaintiff's declaration regarding vandalism of the mailboxes near the Mojave Trail address, his rental of a mail box for the Devonshire address, his accountant's audit of his payments on the mortgage, and a copy of the audit.

The trial court found that plaintiff failed to raise a triable issue of material fact as to whether his mortgage payments were timely. The court held: "The alleged audit proffered by plaintiff and the letter from the accountant who allegedly prepared it lack foundation and are inadmissible. Thus, defendant's [*sic*] properly authenticated business records demonstrate that plaintiff was in arrears in his mortgage payments."

The issue of notice of the default and sale was resolved adversely to plaintiff as well. The trial court held: "As to the notice of default and trustee's sale, the undisputed facts demonstrate that plaintiff did not notify defendant of any change of address

pursuant to the instructions regarding changes of address set forth in the deed of trust. Thus, the notices were proper and plaintiff has failed to identify any defect in the trustee's sale to support the causes of action for declaratory relief or cancellation of deed." Judgment in favor of defendants was filed on November 10, 2003.

Plaintiff's motions to vacate the judgment and for leave to file a third amended complaint were denied. The trial court awarded defendants $52,695 in attorney fees. Plaintiff filed a timely appeal.

DISCUSSION

I

Summary judgment is proper when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We exercise our independent judgment in reviewing an order granting summary judgment, applying the same analysis as the trial court. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383.) A moving defendant has the initial burden of showing that one or more elements of each cause of action cannot be established or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at pp. 853-854.)

Nonjudicial foreclosure is governed by statute. "Civil Code sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust. The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser. (4 Miller & Starr, Cal. Real Estate (2d ed.1989) §§ 9:121, p. 388, 9:154, pp. 505, 516.)" (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*).)

The *Moeller* court summarized the statutory procedure for nonjudicial foreclosure: "Upon default by the trustor, the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale. (Civ. Code, § 2924; 4 Miller & Starr, *supra,* at § 9:131, p. 415.) The foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee. (Civ. Code, § 2924; 4 Miller & Starr, *supra,* at § 9:131, p. 416.) After the notice of default is recorded, the trustee must wait three calendar months before proceeding with the sale. (Civ. Code, § 2924, subd. (b); 4 Miller & Starr, *supra,* § 9:145, p. 471.) After the 3-month period has elapsed, a notice of sale must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale. (Civ. Code, § 2924f; 4 Miller & Starr, *supra,* § 9:146, p. 472.) . . . The conduct of the sale, including any postponements, is governed by Civil Code section 2924g. (*Whitman v. Transtate Title Co.* (1985) 165 Cal.App.3d 312, 317 [211 Cal.Rptr. 582].) The property must be sold at public auction to the highest bidder. (Civ. Code, § 2924g, subd. (a); *Homestead Savings v. Darmiento* (1991) 230 Cal.App.3d 424, 433 [281 Cal.Rptr. 367].)" (*Moeller*, *supra*, 25 Cal.App.4th at p. 830.)

"A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. (*Smith v. Allen* (1968) 68 Cal.2d 93, 96 [65 Cal.Rptr. 153, 436 P.2d 65].)" (*Moeller*, *supra*, 25 Cal.App.4th at p. 831.) "The purchaser at a foreclosure sale takes title by a trustee's deed. If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is *conclusive* as to a bona fide purchaser. (Civ. Code, § 2924; *Homestead Savings v. Darmiento, supra,* 230 Cal.App.3d at p. 431.)" (*Ibid.*, italics added.) "*The conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption*. (4 Miller & Starr, *supra,* § 9:141, p. 463; cf. *Homestead v. Darmiento, supra,* 230 Cal.App.3d at p. 436.) . . . Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee.

(*Munger v. Moore* (1970) 11 Cal.App.3d 1, 9, 11 [89 Cal.Rptr. 323].)" (*Moeller*, *supra*, 25 Cal.App.4th at pp. 831-832, italics added.)

In his separate statement of disputed facts, plaintiff did not dispute that the trustee's deed upon sale was delivered to Westhaven and recorded. That instrument recited that all procedures required by law had been satisfied.[3]

This recitation of compliance with the statutory requirements was sufficient to raise the conclusive presumption under section 2924: "A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof *shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.*" (Italics added.)

As we shall discuss, it is significant that plaintiff did not seek damages against defendants as to either of the two viable causes of action at issue on the summary judgment motion. In the first, for declaratory relief, he sought a judicial declaration that: (a) the trustee's deed issued by Golden West to Westhaven is invalid; (b) he was not in breach of his obligation to World; (c) Westhaven is not a bona fide purchaser; (d) the filing of the notice of default by Golden West was without justification and not in compliance with section 2924 "in that Plaintiff was not in breach of the obligation;" (e)

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[3] "Trustee having complied with all applicable statutory requirements of the State of California and performed all duties required by the Deed of Trust including sending a Notice of Default and Election to Sell within ten days after its recording and a Notice of Sale at least twenty days prior to the Sale Date by certified mail, postage pre-paid to each person entitled to notice in compliance with California Civil Code 2924b. [¶] All requirements per California Statutes regarding the mailing, personal delivery and publication of copies of Notice of Default and Election to Sell under Deed of Trust and Notice of Trustee's Sale, and the posting of copies of Notice of Trustee's Sale have been complied with. Trustee, in compliance with said Notice of Trustee's Sale and in exercise of its powers under said Deed of Trust sold said real property at public auction on 12/11/2001. . . ."

the notices sent pursuant to section 2924 by Golden West were defective and invalid because they were not sent to his last known address; and (f) he is rightful owner of the property. In the other, the fifth cause of action, he sought cancellation of deed against Westhaven and Golden West, and "a judgment that the Trustee's Deed upon Sale issued on December 12, 2001, by GOLDEN WEST . . . be declared void. Further, that the Defendant, WESTHAVEN, be ordered to deliver said deed to the court for cancellation."

In essence, plaintiff was attempting to attack the sale itself and regain title to the property rather than seeking damages against World and Golden West. This effort is barred by the conclusive presumption of section 2924. Because neither party in its briefing focused on the impact of section 2924 in limiting the relief plaintiff may seek, we sent a letter to each side, pursuant to Code of Civil Procedure section 437c, subdivision (m)(2) and Government Code section 68081, asking that they brief the applicability of the conclusive presumption under section 2924.

In their brief, defendants cite the provision of section 2924 giving rise to the conclusive presumption, and argue that the burden is on plaintiff to overcome it. They argue that plaintiff failed to establish that Westhaven was not a bona fide purchaser. But instead of focusing on the principle that the conclusive presumption limits plaintiff to an action for damages against World and Golden West, defendants argue that summary judgment was warranted because plaintiff cannot prove the element of title and therefore cannot allege a viable cause of action for cancellation of deed. They employ the same argument in arguing that summary judgment was proper on the first cause of action for declaratory relief because plaintiff has no rightful claim to the property following the recording of the trustee's deed upon sale.

In his reply brief, plaintiff argues: "[T]he 'presumption' arising under Civil Code § 2924 only applies 'in favor of bona fide purchasers and encumbrancers for value and without notice." He cites no authority to support this statement. Plaintiff continues: "There is nothing in Civil Code § 2924 creating a 'conclusive' presumption 'in favor of' a lender or a trustee as against a borrower." Here, plaintiff inserts a footnote, which we quote in order to illustrate plaintiff's misunderstanding of the impact of the conclusive

presumption: "Although [World] and [Golden West] go to great lengths in Respondent's Brief to argue that Westhaven was a bona fide purchaser, the issues on this appeal involve Plaintiff's rights vis-à-vis [World] and [Golden West]. Also, while counsel for Westhaven has been mailed courtesy copies of the appellate briefs and appendices, Westhaven is not a party to the judgment, nor to this appeal, and has not filed anything with this Court of Appeal. Appellant's causes of action against Westhaven are pending and are not at issue in this Court. Furthermore, it is unclear why [World] and [Golden West] feel the need to argue on this appeal that Westhaven is a bona fide purchaser, since [World's] and [Golden West's] liability to Plaintiff does not depend on whether Westhaven is a bona fide purchaser."

Plaintiff argues that in *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279, we held that section 2924 presumptions apply only as to a bona fide purchaser. He also construes our opinion in that case as holding that a trustee's sale may be challenged "'provided that there is a procedural irregularity.'" Because he claims procedural irregularities relating to notice, plaintiff concludes that defendants may not rely on the presumption under section 2924.

Plaintiff fails to appreciate the distinction between cases in which a procedural irregularity was raised *before* the trustee's deed upon sale had been delivered to the high bidder and those in which the irregularity was raised only *after* the trustee's deed upon sale had been delivered and then recorded. In *6 Angels*, the successful bidder at a trust deed foreclosure sale filed a quiet title action against the trustee after the trustee refused to deliver the trustee's deed because of a mistake in the price at which the sale bidding was opened. Thus the presumption of section 2924 never arose because no deed had been delivered to the high bidder. This is a critical distinction from the present case, in which the presumption arose when the trustee's deed was delivered to Westhaven.

Although we applied different principles in *6 Angels* because there was no conclusive presumption, we recognized the significance of the delivery of the deed to a bona fide buyer following a foreclosure sale: ". . . Civil Code section 2924 contains a statutory presumption 'aris[ing] from the recital in the trustee's deed that all statutory

requirements for notice of default and sale have been satisfied. This presumption is prima facie evidence of compliance and conclusive evidence of compliance in favor of a bona fide purchaser or encumbrancer.' (4 Miller & Starr, *supra,* § 10:211, at p. 648, italics & fn. omitted; see also *Wolfe v. Lipsy* [(1985)] 163 Cal.App.3d [633,] 639-640.) Thus, once a deed reciting that all legal requirements have been satisfied has been transferred to a buyer at a foreclosure sale, the sale can be successfully attacked on the grounds of procedural irregularity *only if* the buyer is not a bona fide purchaser. (*Moeller v. Lien, supra,* 25 Cal.App.4th at p. 831; 4 Miller & Starr, *supra,* § 10:211, at p. 648.)" (*6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., supra,* 85 Cal.App.4th 1279, 1286.)

Here, plaintiff presented no evidence in opposition to summary judgment sufficient to raise a triable issue of material fact as to whether Westhaven was a bona fide purchaser, even though he disputed this conclusion in his separate statement. He cited page 3, lines 15-17 of his declaration in opposition to summary judgment to dispute Westhaven's status as bona fide purchaser. But the cited portion is only plaintiff's declaration that he executed the declaration under penalty of perjury. We have reviewed the remainder of plaintiff's declaration and find nothing concerning Westhaven's status as bona fide purchaser for value. Thus, plaintiff failed to raise a triable issue of material fact as to whether the conclusive presumption of section 2924 applies. (We note, again, that issues as to Westhaven's status as a bona fide purchaser may remain between Westhaven and plaintiff; Westhaven was not a moving or responding party to the summary judgment motion brought by World and Golden West.)

In contrast to *6 Angels, Moeller v. Lien*, *supra*, 25 Cal.App.4th 822 is on point because it involves challenge to a foreclosure sale after the conclusive presumption was raised by delivery of the deed to a bona fide purchaser. In that case, the nonjudicial foreclosure sale was held although the defaulting trustor (Moeller) was attempting to arrange refinancing. The sale was conducted and the trustee's deed was delivered to the high bidders, Chun-Yen Lien and Fong T. Lien, and was recorded by them. It contained the necessary recitations that the trustee had complied with all requirements of law

regarding mailing, personal delivery, and publication of copies of the notice of default and election to sell and notice of trustee's sale. (*Id.* at p. 828.)

Moeller sued the lender, the lender's foreclosure agent, the high bidders, and others, seeking to set aside the sale, cancel the deed, quiet title, and obtain an award of damages. (*Moeller v. Lien, supra*, 25 Cal.App.4th at p. 826.) The trial court ruled in favor of Moeller, cancelled the trust deed, quieted title in Moeller, and ordered Moeller to pay certain damages. The Court of Appeal reversed, finding that the Liens were bona fide purchasers for value and that there were no irregularities in the sale. (*Id.* at p. 829.) The court held that the conclusive presumption raised by the trustee's deed under section 2924 "precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption. (4 Miller & Starr, *supra*, § 9:141, p. 463; cf. *Homestead v. Darmiento, supra,* 230 Cal.App.3d at p. 436.) . . . Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee. (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 9, 11 [89 Cal.Rptr. 323].)" (25 Cal.App.4th at pp. 831-832.) The court concluded that the "statutory scheme also evidences an intent that a properly conducted sale be a final adjudication of the rights of the creditor and debtor [citations] and the sanctity of title of a bona fide purchaser be protected." (*Id.* at p. 832.)

Because the sale in *Moeller* was to a bona fide purchaser for value and a trustee's deed containing the required statutory recitals was delivered, the Court of Appeal held that the sale was conclusively presumed to be valid. (*Moeller*, *supra*, 25 Cal.App.4th at p. 833.) That precluded Moeller from attacking its validity. (*Id.* at pp. 833-834.)

Three other cases involving challenges to nonjudicial foreclosure sales because of irregularities are distinguishable because each involved a circumstance in which the conclusive presumption did not arise because the trustee's deed had not yet been delivered to the high bidder. The leading case, *Little v. CFS Service Corp*. (1987) 188 Cal.App.3d 1354, recognized that the section 2924 conclusive presumption of regularity of the sale is determinative where a notice defect is raised in the context of foreclosure

sales. (*Id.* at p. 1359.) In that case, there was no conclusive presumption and the trial court declaration that the foreclosure sale was void was affirmed. (*Id.* at pp. 1360-1361; see also *Angell v. Superior Court* (1999) 73 Cal.App.4th 691 [in absence of conclusive presumption because defect in foreclosure was raised before deed was delivered, trustee could abort sale].) In *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, the court concluded: "[I]f the trustee's deed with the appropriate recitations has been issued to a bona fide purchaser, the purpose of the statutory scheme to provide a prompt and efficient remedy for creditors is implemented by the section 2924 statutory presumption of finality." (108 Cal.App.4th at p. 822.) Because the deed had not been delivered to the high bidder in the case before it, the *Residential Capital* court allowed Residential Capital to seek return of its money and damages. (*Id.* at p. 823.)

It is uncontested that the trustee delivered a trustee's deed on sale containing the required recitations to Westhaven, a bona fide purchaser for value, following the foreclosure sale. This raised a conclusive presumption under section 2924 limiting plaintiff to an action for damages against World and Golden West, and precluding him from an action to set aside the deed or to regain title to the property. On this basis, defendants were entitled to summary adjudication in their favor on the causes of action for declaratory relief and to cancel the deed.

The next question is whether plaintiff preserved his right to seek damages for wrongful foreclosure at any stage of the litigation, and if so, whether reversal is required.

II

The issue of a claim for damages by plaintiff arose at three procedural stages in this action. The first was on the trial court's order sustaining defendants' demurrer without leave to amend to plaintiff's causes of action for negligence and negligent infliction of emotional distress in the second amended complaint. The second was when the motion for summary judgment was granted. As we shall explain, the evidence presented in opposition raised a triable issue of material fact as to whether plaintiff had a valid claim for damages based on the foreclosure sale. The third was on the denial of

plaintiff's motion to file a third amended complaint, which was heard in conjunction with his motion to vacate the judgment.

A. The Demurrer

As we have seen, the trial court sustained the demurrer to the damages causes of action in the second amended complaint. The minute order states: "For the first time, plaintiff alleges a cause of action for negligence in the Second Cause of Action: the Third Cause of Action alleges negligent infliction of emotional distress. The demurrer is sustained as to the second cause of action because plaintiff improperly amended the complaint to add this cause of action after the demurrer. In the alternative, the Court sustains the demurrer to the second cause of action for negligence. Without a properly pled negligence cause of action, the third cause of action for negligent infliction of emotional distress must fail as well."

Plaintiff was required to obtain leave to file the second amended complaint because there already had been a responsive pleading to the first amended complaint. (See *Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 175.) He did not do so. This oversight rendered the second amended complaint subject to a motion to strike. Defendants filed a motion to strike, but it did not address this issue. They chose instead to attack the pleading by general demurrer. The trial court could have construed the general demurrer as a motion to strike, but did not do so.

The negligence cause of action in the second amended complaint was in essence a re-labeling of the monetary damages cause of action alleged in the first amended complaint. The gravamen of each was wrongful foreclosure without proper notice. They bore different labels, but labels are not controlling: "Regardless of the label attached to the cause of action, we must examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. Reversible error is committed if the facts alleged show entitlement to relief under any possible legal theory." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 493.)

Had defendants employed the proper procedure and moved to strike the second amended complaint because it was unauthorized, the motion presumably would have

been granted and the first amended complaint would have remained the charging pleading since World had filed an answer.[4] Instead, they demurred to the damages causes of action. Defendants are not entitled to a better result by employing the wrong procedure than they would have achieved by using the right one. World had answered the first amended complaint, which sought monetary damages. As a result, plaintiff preserved that cause of action.[5] The trial court thus erred in sustaining the demurrer without leave to amend and plaintiff has preserved his claims for wrongful foreclosure and negligent infliction of emotional distress. We do not imply any conclusion as to the sufficiency of the pleading of the emotional distress claim. But, as we shall next discuss, cutting through the procedural morass, plaintiff alleged a good cause of action for wrongful foreclosure.[6]

In ruling on plaintiff's claims seeking to set aside the foreclosure and ensuing trustee's deed, the trial court reached defendant's summary judgment claim, including the argument as to whether the notices of default and of the foreclosure sale were defective because they were not sent to the Devonshire address. The failure to send them there is the basis for plaintiff's claim of wrongful foreclosure.

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[4] As we have stated, in lieu of an answer to the first amended complaint, Golden West filed a declaration pursuant to section 2924, stating "GOLDEN WEST maintains a reasonable belief that it has not been named as a Defendant in the instant suit due to any actual acts or omissions on its part in connection with the performance of its duties as trustee under the Deed of Trust as GOLDEN WEST has complied at all times with state law in regard to its duties as Trustee. [¶] GOLDEN WEST agrees to be bound by whatever order or judgment is issued by the Court regarding the subject Deed of Trust."

[5] We address the damages claim against Golden West separately, *infra*.

[6] We need not, and do not, discuss plaintiff's alternative arguments that he should have been granted leave to amend before the trial court granted judgment **(***Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654) or that his motions to vacate the judgment and to file a third amended complaint should have been granted.

Plaintiff argues the trial court erred in granting summary judgment because he raised a triable issue of material fact as to whether he was given proper notice of the default and the trustee's sale. He contends that he had notified World of a change of address, from the Mojave Trail property to an address on Devonshire Street in Chatsworth. Defendants argue that this notification was ineffective because it was sent to them at an address in San Antonio, Texas, rather than to the address in Oakland specified in the notice provisions in the promissory note and in the deed of trust. Absent a valid change of address, they argue, they were justified in sending the notices to plaintiff at the Mojave Trail address.

In his separate statement of disputed facts, plaintiff contended that he had sent a notice of new address to defendants (the Devonshire address). In his declaration, he explained that he did not receive mail at the Mojave Trail address: "The subject property, my former home, is located in a rural area of Chatsworth, California. The Post Office does not deliver mail directly to the homes in that area. All mail is otherwise delivered to mailboxes that are placed in an empty dirt lot by the main highway. These mailboxes are persistently vandalized. At the U.S. Post Office's suggestion, I rented a mail box on Devonshire Street to receive my mail. If anything is not mailed there, I do not receive it."

Defendants asserted broad evidentiary objections to portions of plaintiff's declaration regarding the reasons he chose to receive his mail at Devonshire rather than at Mojave Trail. They argued that his statements that the mailbox for Mojave Trail had been subject to vandalism, and that the Post Office suggested he acquire another mailing address lacked personal knowledge and foundation, were hearsay, and were vague. The trial court sustained the objections without stating the precise ground. The objections were not well-taken. The declaration was admissible, reflecting plaintiff's reasons for changing his mailing address.

The issue is whether plaintiff's change of address notification itself was sent to the proper address. Plaintiff declared that he sent it to World on March 22, 2001, and he attached a copy. It was addressed to the Customer Service Department of World Savings, at 4101 Wiseman Boulevard, San Antonio, Texas 78251. Plaintiff mailed the notice of

change of address to World in San Antonio because his loan statements directed him to send correspondence regarding the loan to that address.[7] The letter, which includes the loan number, states: "I have tried numerous times to have you mail any correspondence to me at the above address. [¶] Please note the following change of address: [¶] Send all correspondence regarding this account to: [¶] Barry Lenett [¶] 21704 Devonshire Street #303 [¶] Chatsworth, CA 91311." He also provided certificate of mailing forms stamped by the United States Postal Service showing that this letter was mailed as addressed.

Plaintiff also submitted World's response to requests for admission. Subject to several objections, World admitted that its records include a March 22, 2001 letter from plaintiff with the Devonshire address on the letterhead. It also admitted that it had in its records letters from plaintiff with the Devonshire address on the letterhead, dated December 19, 1997, February 23, 1998, May 19, 1998, and July 30, 1998.

Mary Reeder, a senior vice president for World, provided a declaration in support of the summary judgment motion. She was custodian of World's loan servicing records relating to plaintiff and was charged with monitoring problem loan cases. She personally reviewed World's business records in preparation of her declaration and explained World's practices for generating and maintaining business records.

Ms. Reeder declared: "I have analyzed [World's] loan servicing records and correspondence received from Plaintiff from 1997 to the present. At no time did Plaintiff send a notice of alternative address to [World] as required by the Deed of Trust, and at no time did [World] receive such a notice. Plaintiff alleges a notice of change of address was sent to [World] via certified mail in March of 2001, but [World's] records do not show that such a notice was ever received. A true and correct copy [of World's]

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[7] Plaintiff provided this explanation about using the San Antonio address in support of his motion to vacate the judgment, but not in opposition to the motion for summary judgment.

computerized Consolidated Notes Log screens for the period between February 13, 2001 and April 24, 2001 are attached hereto as Exhibit H."

Section 2924b governs notices of default and of sale under a mortgage or deed of trust. Subdivision (b)(1) requires the trustee to mail a copy of the notice of default, within 10 days of its recordation, "to each trustor or mortgagor *at his or her last known address if different than the address specified in the deed of trust or mortgage with power of sale*." (Italics added.) Similarly, subdivision (b)(2) of section 2924b requires the trustee to mail notice of a foreclosure sale to the trustor "at his or her last known address if different than the address specified in the deed of trust or mortgage with power of sale." Subdivision (b)(3) of section 2924b defines last known address: "As used in [section 2924b, subdivision (b)] paragraphs (1) and (2), the 'last known address' of each trustor or mortgagor means the last business or residence address actually known by the mortgagee, beneficiary, trustee, or other person authorized to record the notice of default. The beneficiary shall inform the trustee of the trustor's last address actually known by the beneficiary. *However, the trustee shall incur no liability for failing to send any notice to the last address unless the trustee has actual knowledge of it*." (Italics added.)

In their supplemental brief and at oral argument, defendants contended that we must construe the disjunctive term in section 2924b, subdivision (b)(3), allowing notice at the last known business *or* residence address, to authorize notice to the Mojave Trail address despite plaintiff's change of address letter. They reason that Mojave Trail was plaintiff's residence, financed by the mortgage in default, and thus it is the "residence" address for this mortgage. Thus, defendants would have us ignore the language of the security instruments allowing the plaintiff to designate an alternate address. This construction would also render surplusage the language in section 2924b, subdivision (b), paragraphs (1) and (2) requiring notice to the last known address. We are not persuaded. The statute indicates that the legislature anticipated the situation presented here, that a trustor would choose at some point to use a mailing address different from that originally designated in the note or deed of trust.

"[W]henever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 775-776 [13 Cal.Rptr.2d 30, 838 P.2d 758]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].)" (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330.) As we have discussed, one of the purposes of the Legislature in enacting the nonjudicial foreclosure statutes was to "protect the debtor/trustor from wrongful loss of the property." (*Moeller*, *supra*, 25 Cal.App.4th at p. 830.) In order to further that purpose, and to give effect to every word of subdivision (b) of section 2924b, we conclude that the notice provisions must be construed to require a trustee to give notice of default or foreclosure sale to the trustor at the last known business or residence address, even if it is not the address of the property financed by the mortgage, where the trustor continues to reside. This construction would allow a trustor to designate a chosen mailing address under the procedures set out in the note or deed of trust and to receive notice of any default or foreclosure sale at that address.

Plaintiff's evidence on summary judgment was sufficient to raise a triable issue of material fact as to whether World had notice that his last known address was Devonshire Avenue, and that the trustee should have been instructed to notify him at that address of the default and the foreclosure sale. He alleged this as a basis for what is in substance an action for wrongful foreclosure as against World. The damages causes of action remain part of the charging pleading as to World. But Golden West, as trustee, is in a different posture.

Section 2924 protects a trustee from liability based on good faith reliance on information provided by a beneficiary: "In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage." And, section 2924b, subdivision (b)(3) expressly limits the exposure of a trustee arising from

notice of foreclosure proceedings: "[T]he trustee shall incur no liability for failing to send any notice to the last address unless the trustee has actual knowledge of it."

In opposition to summary judgment, plaintiff presented evidence by way of admission that World had his Devonshire change of address in its files. There was no evidence that Golden West had actual notice of that new address. Plaintiff failed to raise a triable issue of material fact as to Golden West, and summary judgment was proper as to it on this alternative ground. Plaintiff thus cannot bring a damage action against Golden West.

In light of our conclusion that the judgment must be reversed as to World, we vacate the award of attorneys fees. On remand, the trial court is to reconsider the motion to determine what fee award, if any, should be made in favor of Golden West.

DISPOSITION

The judgment is affirmed as to Golden West. It is reversed as to World. Each party is to bear its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

HASTINGS, J.

GRIMES, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.